

1 SAM HIRSCH

2 Acting Assistant Attorney General
3 Environment & Natural Resources Division
4 United States Department of Justice
5 LESLIE M. HILL (D.C. Bar No. 476008)
6 Leslie.Hill@usdoj.gov
7 Environmental Defense Section
8 601 D Street N.W., Suite 8000
9 Washington D.C. 20004
10 Telephone (202) 514-0375
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12 Attorneys for Defendant

13 Richard H. Mays (AR Bar No. 61043)
14 RICHARD MAYS LAW FIRM, PLLC
15 115 South Third Street
16 Heber Springs, AR 72543

17 Attorney for Plaintiff

18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE EASTERN DISTRICT OF ARKANSAS**

20 SIERRA CLUB,

21 Plaintiff,

22 v.

23 GINA McCARTHY, in her official capacity
24 as the Administrator of the United States
25 Environmental Protection Agency,

26 Defendant.

Case No. 4:14-cv-00643-JLH

[PROPOSED] CONSENT DECREE

27 WHEREAS, on August 6, 2014, Plaintiff Sierra Club ("Plaintiff") filed the above-
28 captioned matter in the U.S. District Court for the Northern District of California against
Gina McCarthy, in her official capacity as Administrator of the United States
Environmental Protection Agency (hereinafter "EPA" or "Defendant");

1 WHEREAS, by Order dated October 30, 2014, the U.S. District Court for the
2 Northern District of California transferred this case to this District;

3 WHEREAS, Plaintiff alleges that EPA has failed to undertake certain non-
4 discretionary duties under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, and
5 that such alleged failure is actionable under section 304(a)(2) of the CAA, § 7604(a)(2);

6 WHEREAS, Plaintiff alleges that EPA has failed to perform a duty mandated by
7 CAA section 110(c)(1)(B), 42 U.S.C. § 7410(c)(1)(B), to promulgate a Federal
8 implementation plan within 2 years after disapproving a state implementation plan
9 ("SIP") submission in whole or in part;

10 WHEREAS, Plaintiff alleges that on March 12, 2012, EPA disapproved, in part, a
11 revision to the Arkansas SIP intended to address the regional haze ("RH") requirements
12 of section 169A(b)(2)(B), 42 U.S.C. § 7491(b)(2)(B), and the implementing regulations
13 set forth at 40 C.F.R. § 51.308(d)(1)(A), *Final Rule*, 77 Fed. Reg. 14,604 (Mar. 12,
14 2014);

15 WHEREAS, Plaintiff alleges that on March 12, 2012, EPA also partially
16 disapproved the portion of the Arkansas SIP submittal that addresses the visibility
17 requirement of section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), for the 1997
18 8-hour ozone, *Final Rule*, 62 Fed. Reg. 38,856 (Jul 18, 1997), and 1997 fine particulate
19 matter ("PM_{2.5}"), *Final Rule*, 62 Fed. Reg. 38,652 (Jul 18, 1997), national ambient air
20 quality standards ("NAAQS") and that the Arkansas SIP contain adequate provisions to
21 prohibit emissions from interfering with measures required in another state to protect
22 visibility, 77 Fed. Reg. at 14,604;

23 WHEREAS, on March 12, 2012, EPA stated that it "must, within 24 months
24 following a final disapproval, either approve a SIP or promulgate a Federal
25 Implementation Plan ["FIP"]. We will of course consider, and would prefer, approving a
26 SIP if the state submits a revised plan that we can approve before the expiration of the
27 mandatory FIP clock for the portions of the SIP we are disapproving in this rulemaking
28 action," 77 Fed. Reg. at 14,606;

1 WHEREAS, Plaintiff alleges that the referenced EPA partial disapproval
2 decisions took effect on April 11, 2012;

3 WHEREAS, EPA did not, by April 11, 2014, promulgate a regional haze FIP or
4 approve a revised regional haze SIP for Arkansas;

5 WHEREAS, EPA did not, by April 11, 2014, promulgate a FIP or approve a
6 revised SIP for Arkansas addressing the requirements of section 110(a)(2)(D)(i)(II), 42
7 U.S.C. § 7410(a)(2)(D)(i)(II), for the 1997 8-hour ozone NAAQS and the 1997 PM_{2.5}
8 NAAQS;

9 WHEREAS, the relief requested in the Complaint includes, among other things,
10 an order from this Court to establish a date certain by which EPA must fulfill its
11 obligations;

12 WHEREAS, Plaintiff and EPA have agreed to a settlement of this action without
13 admission of any issue of fact or law, except as expressly provided herein;

14 WHEREAS, Plaintiff and EPA, by entering into this Consent Decree, do not
15 waive or limit any claim, remedy, or defense, on any grounds, related to any final EPA
16 action;

17 WHEREAS, Plaintiff and EPA consider this Consent Decree to be an adequate
18 and equitable resolution of all the claims in this matter and therefore wish to effectuate a
19 settlement;

20 WHEREAS, it is in the interest of the public, Plaintiff Sierra Club, Defendant
21 EPA, and judicial economy to resolve this matter without protracted litigation;

22 WHEREAS, Plaintiff and EPA agree that this Court has jurisdiction over this
23 matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. §
24 7604(a)(2); and

25 WHEREAS, the Court, by entering this Consent Decree, finds that the Consent
26 Decree is fair, reasonable, in the public interest, and consistent with the Clean Air Act;

1 NOW THEREFORE, before the taking of testimony, without trial or
2 determination of any issues of fact or law, and upon the consent of Plaintiff Sierra Club
3 and Defendant EPA, it is hereby ordered, adjudged and decreed that:

4 1. The appropriate EPA official shall:

5 a. either sign a notice of proposed rulemaking in which it proposes
6 approval of a revised SIP submission from Arkansas, promulgation of a FIP, or partial
7 approval of a revised SIP submission and promulgation of a partial FIP for Arkansas that
8 collectively addresses the deficiencies in Arkansas' regional haze SIP identified by EPA
9 its March 12, 2012 action, 77 Fed. Reg. 14,604, no later than February 17, 2015; and sign
10 a notice of final rulemaking to address these requirements no later than December 15,
11 2015; and

12 b. either sign a notice of proposed rulemaking in which it proposes
13 approval of a revised SIP submission, promulgation of a FIP, or partial approval of a
14 revised SIP submission and promulgation of a partial FIP for Arkansas that collectively
15 addresses the deficiencies in Arkansas' SIP related to the requirements of CAA section
16 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), for the 1997 8-hour ozone NAAQS
17 and the 1997 PM_{2.5} NAAQS, identified by EPA its March 12, 2012 action, 77 Fed. Reg.
18 14,604, no later than February 17, 2015; and sign a notice of final rulemaking to address
19 these requirements no later than December 15, 2015.

20 2. EPA shall, within 15 business days of signature, deliver notice of each action
21 taken pursuant to paragraph 1 of this Consent Decree to the Office of the Federal Register
22 for review and publication.

23 3. After EPA has completed the actions set forth in Paragraph 1 of this Consent
24 Decree and after notice of each proposed and final action required by paragraph 1 has
25 been published in the Federal Register, EPA may move to have this Decree terminated
26 and the action dismissed. Plaintiff shall have fourteen (14) days in which to respond to
27 such motion, unless the parties stipulate to a longer time for Plaintiff to respond.
28

1 4. The deadlines established by this Consent Decree may be extended (a) by
2 written stipulation of Plaintiff and EPA with notice to the Court, or (b) by the Court upon
3 motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure
4 and upon consideration of any response by Plaintiff and any reply by EPA. Any other
5 provision of this Consent Decree also may be modified by the Court following motion of
6 an undersigned party for good cause shown pursuant to the Federal Rules of Civil
7 Procedure and upon consideration of any response by a non-moving party and any reply.

8 5. If a lapse in appropriations for EPA occurs within one hundred and twenty
9 (120) days prior to any deadline in Paragraph 1 in this Decree, that deadlines shall be
10 extended automatically one day for each day of the lapse in appropriations. The Parties
11 recognize that the possibility exists that circumstances outside the reasonable control of
12 EPA could delay compliance with the timetables contained in this Consent Decree. Such
13 situations include, but are not limited to, a government shut-down such as occurred in
14 1995, 1996, and 2013, or catastrophic environmental events requiring immediate and/or
15 time-consuming response by EPA. Should a delay occur due to such circumstances, any
16 resulting failure to meet the timetables set forth herein shall not constitute a failure to
17 comply with the terms of this Consent Decree, and the Parties will meet and confer about
18 the extension of any deadlines occurring within one hundred twenty (120) days of the
19 termination of the delay. Such dates shall be extended no less than one day for each day
20 of the delay. EPA will provide Plaintiff with notice as soon as is reasonably possible
21 under the circumstances in the event that EPA invokes this term of the Consent Decree
22 and will provide Plaintiff with an explanation of EPA's basis for invoking this term. If
23 the Parties are unable to reach agreement on an extension of such deadlines exceeding
24 one day for each day of delay, EPA reserves the right to move the Court for such an
25 extension.

26 6. Plaintiff and EPA agree that this Consent Decree shall constitute a complete
27 and final settlement of all claims that Plaintiff has asserted in this case. The Sierra Club
28

1 therefore discharges and covenants not to sue the United States, including EPA, for any
2 such claims.

3 7. In the event of a dispute between Plaintiff and EPA concerning the
4 interpretation or implementation of any aspect of this Consent Decree, the disputing party
5 shall provide the other party with a written notice outlining the nature of the dispute and
6 requesting informal negotiations. These parties shall meet and confer in order to attempt
7 to resolve the dispute. If these parties are unable to resolve the dispute within ten (10)
8 business days after receipt of the notice, either party may petition the Court to resolve the
9 dispute.

10 8. No motion or other proceeding seeking to enforce this Consent Decree or for
11 contempt of Court shall be properly filed unless the procedure set forth in Paragraph 7
12 has been followed, and the moving party has provided the other party with written notice
13 received at least ten (10) business days before the filing of such motion or proceeding.

14 9. EPA agrees that Plaintiff is entitled to recover "costs of litigation" (including
15 reasonable attorney fees) incurred in this matter pursuant to 42 U.S.C. § 7604(d). The
16 deadline for filing a motion for costs of litigation (including attorney fees) for activities
17 performed prior to entry of the Consent Decree is hereby extended until ninety (90) days
18 after this Consent Decree is entered by the Court. During this period, the Parties shall
19 seek to resolve informally any claim for costs of litigation (including attorney fees), and
20 if they cannot, Plaintiff will file a motion for costs of litigation (including attorney fees)
21 or a stipulation or motion to extend the deadline to file such a motion. Plaintiff reserves
22 its right to seek litigation costs for any work performed after the lodging of this Consent
23 Decree. EPA does not concede that Plaintiff will be entitled to recover costs incurred
24 after the lodging of this Consent Decree, and the parties reserve all claims and defenses
25 with respect to any future claim for costs of litigation.

26 10. This Court shall retain jurisdiction over this matter to enforce the terms of
27 this Consent Decree and to consider any requests for costs of litigation, including
28 attorney fees.

1 11. Nothing in the terms of this Consent Decree shall be construed (a) to confer
2 upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction
3 of the United States Courts of Appeals under CAA section 307(b)(1),
4 42 U.S.C. § 7607(b)(1) or (b) to waive any claims, remedies, or defenses that the parties
5 may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

6 12. Nothing in this Consent Decree shall be construed to limit or modify any
7 discretion accorded EPA by the Clean Air Act or by general principles of administrative
8 law in taking the actions which are the subject of this Consent Decree, including the
9 discretion to alter, amend, or revise any final actions promulgated pursuant to this
10 Consent Decree. EPA's obligation to perform each action specified in this Consent
11 Decree does not constitute a limitation or modification of EPA's discretion within the
12 meaning of this paragraph.

13 13. Except as expressly provided herein, nothing in this Consent Decree shall be
14 construed as an admission of any issue of fact or law nor to waive or limit any claim,
15 remedy, or defense, on any grounds, related to any final action EPA takes with respect to
16 the actions addressed in this Consent Decree.

17 14. It is hereby expressly understood and agreed that this Consent Decree was
18 jointly drafted by Plaintiff and EPA. Accordingly, the parties hereby agree that any and
19 all rules of construction to the effect that ambiguity is construed against the drafting party
20 shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of
21 this Consent Decree.

22 15. The parties agree and acknowledge that before this Consent Decree can be
23 finalized and entered by the Court, EPA must provide notice of this Consent Decree in
24 the Federal Register and an opportunity for public comment pursuant to CAA section
25 113(g), 42 U.S.C. § 7413(g). After this Consent Decree has undergone notice and
26 comment, the Administrator and/or the Attorney General, as appropriate, shall promptly
27 consider any written comments in determining whether to withdraw or withhold their
28 consent to the Consent Decree, in accordance with CAA section 113(g). If the

1 Administrator and/or the Attorney General do not elect to withdraw or withhold consent,
2 EPA shall promptly file a motion that requests that the Court enter this Consent Decree.

3 16. Any notices required or provided for by this Consent Decree shall be in
4 writing, via electronic mail or other means, and sent to the following (or to any new
5 address of counsel as filed and listed in the docket of the above-captioned matter, at a
6 future date):

7 For Plaintiff Sierra Club:

8 Richard H. Mays, Esq.
9 RICHARD MAYS LAW FIRM, PLLC
10 115 South Third Street
11 Heber Springs, AR 72543

12 Casey A. Roberts
13 Tony G. Mendoza
14 Sierra Club
15 85 Second Street, 211d Floor
16 San Francisco, CA 94105
17 (415) 977-5710 (Roberts)
18 (415) 977-5589 (Mendoza)
19 (415) 977-5793 (facsimile)
20 casey.roberts@sierraclub.org
21 tony.mendoza@sierraclub.org

22 For Defendant EPA:

23 Leslie M. Hill
24 U.S. Department of Justice
25 Environment & Natural Resources Division
26 Environmental Defense Section
27 601 D Street N.W., Suite 8000
28 Washington D.C. 20004
Tel. (202) 514-0375
Email: leslie.hill@usdoj.gov

17. EPA and Plaintiff recognize and acknowledge that the obligations imposed
upon EPA under this Consent Decree can only be undertaken using appropriated funds
legally available for such purpose. No provision of this Consent Decree shall be
interpreted as or constitute a commitment or requirement that the United States obligate

1 or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
2 applicable provision of law.

3 18. If for any reason the Court should decline to approve this Consent Decree in
4 the form presented, this agreement is voidable at the sole discretion of either party and
5 the terms of the proposed Consent Decree may not be used as evidence in any litigation
6 between the parties.

7 19. The undersigned representatives of Plaintiff Sierra Club and Defendant EPA
8 certify that they are fully authorized by the party they represent to consent to the Court's
9 entry of the terms and conditions of this Decree.

10
11 SO ORDERED on this _____ day of _____, 20142015.

12
13
14 _____
J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

15 COUNSEL FOR PLAINTIFF:

16
17 _____
18 Richard H. Mays (AR Bar No. 61043)
19 RICHARD MAYS LAW FIRM, PLLC
20 115 South Third Street
Heber Springs, AR 72543

21 CASEY A. ROBERTS (CA Bar No. 253474)
22 SIERRA CLUB
23 85 Second Street, 211d Floor
24 San Francisco, CA 94105
(415) 977-5710
(415) 977-5793 (facsimile)
casey.roberts@sierraclub.org

25 TONY G. MENDOZA
26 SIERRA CLUB
27 85 Second Street, 2nd Floor
28 San Francisco, CA 94105
(415) 977-5589
(415) 977-5793 (facsimile)

1 tony.mendoza@sierraclub.org

2 *Attorneys for Plaintiff Sierra Club*

3
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5
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7
8
9 COUNSEL FOR DEFENDANT:

SAM HIRSCH

Acting Assistant Attorney General

Environment & Natural Resources Division

10
11
12
13 _____
LESLIE M. HILL (D.C. Bar No. 476008)

Environmental Defense Section

601 D Street N.W., Suite 8000

Washington D.C. 20004

Tel: (202) 514-0375

Email: Leslie.Hill@usdoj.gov

14
15
16
17 *Attorneys for Defendant EPA*

18
19 Of counsel:

Barbara A. Nann

Assistant Regional Counsel

Region 6

20
21 U.S. Environmental Protection Agency
22
23
24
25
26
27
28

Nann, Barbara

From: Tony Mendoza <tony.mendoza@sierraclub.org>
Sent: Tuesday, December 16, 2014 4:48 PM
To: Hill, Leslie (ENRD)
Cc: Nann, Barbara; Anderson, Lea; rhmays@richardmayslawfirm.com; Casey Roberts
Subject: Re: Draft Consent Decree - Case No. 3:14-cv-03541-JD

Leslie - These revisions are acceptable to us. Thanks. Tony

On Tue, Dec 16, 2014 at 2:29 PM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

Tony –

Per our conversation, attached is a revised CD w/ the changes I mentioned.

Leslie

From: Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
Sent: Tuesday, December 16, 2014 3:05 PM

To: Hill, Leslie (ENRD)
Cc: Nann, Barbara; Anderson, Lea; rhmays@richardmayslawfirm.com; Casey Roberts
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Leslie - At your convenience, could you provide us an update on when this consent decree might be ready for filing? I hope we can have this case resolved before the holidays. We remain willing to assist with the logistics of filing if that's helpful to you. Thanks. Tony

On Fri, Dec 5, 2014 at 2:28 PM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

Thanks Tony.

From: Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
Sent: Friday, December 05, 2014 4:59 PM
To: Nann, Barbara
Cc: Hill, Leslie (ENRD); Anderson, Lea; rhmays@richardmayslawfirm.com; Casey Roberts

Subject: Re: Draft Consent Decree - Case No. 3:14-cv-03541-JD

Yes. That edit is fine with us.

On Fri, Dec 5, 2014 at 1:54 PM, Nann, Barbara <nann.barbara@epa.gov> wrote:

A quick edit. I noticed that the proposal due date February 16, 2015 is a federal holiday (President's Day). Can we change the proposal due date to Tuesday, February 17, 2015?

Barbara

Barbara A. Nann

Assistant Regional Counsel

OECA & OGC Lead Region Coordinator

U.S. Environmental Protection Agency, Region 6

1445 Ross Avenue, Suite 1200

Dallas, Texas 75202

Phone: (214) 665-2157

Work Cell: (469) 416-9629

Fax: (214) 665-2182

From: Tony Mendoza [mailto:tony.mendoza@sierraclub.org]

Sent: Tuesday, November 25, 2014 5:38 PM

To: Hill, Leslie (ENRD)

Cc: Nann, Barbara; Anderson, Lea; rhmay@richardmayslawfirm.com; Casey Roberts

Subject: Re: Draft Consent Decree - Case No. 3:14-cv-03541-JD

Leslie - Your revisions all are fine with us. The attached version includes Richard's signature block; otherwise, we have no changes. We have approval to sign this consent decree on our end and Richard has offered to help file it. Let us know if you'd like his help or need anything else from us. Tony

On Mon, Nov 24, 2014 at 8:14 AM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

Tony/Richard –

Attached please find the current draft of the proposed consent decree.

Leslie

From: Tony Mendoza [mailto:tony.mendoza@sierraclub.org]

Sent: Friday, November 21, 2014 3:31 PM

To: Hill, Leslie (ENRD)

Cc: Nann, Barbara; Anderson, Lea; rhmay@richardmayslawfirm.com; Casey Roberts

Subject: Re: Draft Consent Decree - Case No. 3:14-cv-03541-JD

Hi Leslie - Two things:

First, Richard Mays is representing Sierra Club in this case in the Arkansas federal court. He's cc'ed here. Please include Richard on future communications regarding this case.

Second, I was wondering if you'd had a chance to look at our proposed revisions to the consent decree? If you're uncomfortable with the attorneys' fees language we can put that dispute off till after the consent

decree is agreed to. Though we do think we are entitled to attorneys' fees, our main goal is to get this decree lodged as soon as we can.

Tony

On Wed, Nov 5, 2014 at 9:40 AM, Tony Mendoza <tony.mendoza@sierraclub.org> wrote:

Leslie -

Attached are some proposed revisions to the consent decree. Of particular note, we suggest a revision to the attorneys' fees paragraph to indicate that EPA agrees Sierra Club is entitled to costs of litigation up to the date of lodging the consent decree. The reasonableness of any particular costs would of course be subject to negotiation (or a Sierra Club motion if it comes to it). I borrowed this language from a consent decree that was filed in another deadline suit (attached here). I think this revised language is reasonable, correctly reflects the law, and, if adopted, would streamline our costs discussions after the consent decree is filed.

In terms of timing, we should be prepared to have our local counsel enter an appearance in the Arkansas court next week. And, assuming we can come to final agreement on the details of the consent decree, we should have approval to settle by next week as well.

Please don't hesitate to call me if there are issues we should discuss.

Tony

On Wed, Oct 15, 2014 at 12:15 PM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

Tony/Casey -

Attached please find a draft consent decree. If we're able to transfer the case, it would seem most efficient to proceed with our respective management/client reviews in the meantime. That way, assuming we receive management/client approval, we'd be in a position to lodge the CD quickly upon transfer. Let us know if that approach works for you.

Leslie

--
Tony G Mendoza

Staff Attorney

Sierra Club Environmental Law Program

85 Second St., 2nd Floor

San Francisco, CA 94105

(415) 977-5589

(415) 977-5793 fax

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Thanks Tony. I'll let you know when we complete both the EPA and DOJ management review processes.

Leslie

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To: Nann, Barbara

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To: Hill, Leslie (ENRD)

Cc: Nann, Barbara; Anderson, Lea; rhmay@richardmayslawfirm.com; Casey Roberts

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Sent: Friday, December 19, 2014 10:23 AM
To: 'Tony Mendoza'
Cc: Nann, Barbara; Anderson, Lea; rhmays@richardmayslawfirm.com; Casey Roberts
Subject: RE: Draft Consent Decree - Case No. 3:14-cv-03541-JD

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Subject: Call Today: Arkansas RH

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Conference line: (866) 410-9426, Code: 4961010938#

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Cc: rhmays@richardmayslawfirm.com; Casey Roberts; Nann, Barbara
Subject: Arkansas consent decree - change in deadline for proposed rule

Leslie - We agree to the extension to March 6 as long as the deadline for the final rule is not changed. Please let me and Richard know if you could use our help with re-filing the consent decree. Tony

--
Tony G Mendoza
Staff Attorney
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
(415) 977-5589
(415) 977-5793 fax
tony.mendoza@sierraclub.org

Nann, Barbara

From: Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov>
Sent: Tuesday, January 13, 2015 4:01 PM
To: Tony Mendoza
Cc: rhmays@richardmayslawfirm.com; Casey Roberts; Nann, Barbara
Subject: RE: Arkansas consent decree - change in deadline for proposed rule

Thank you Tony. Let me see if I can ask someone here, but if not I'll let you know.

Leslie

From: Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
Sent: Tuesday, January 13, 2015 5:00 PM
To: Hill, Leslie (ENRD)
Cc: rhmays@richardmayslawfirm.com; Casey Roberts; Nann, Barbara
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Nann, Barbara

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Sent: Tuesday, January 13, 2015 5:03 PM
To: Tony Mendoza
Cc: rhmays@richardmayslawfirm.com; Casey Roberts; Nann, Barbara
Subject: RE: Arkansas consent decree - change in deadline for proposed rule
Attachments: ENV_DEFENSE-#705598-v10-SC_v_McCarthy_(AK_Haze)_Proposed_Consent_Decree_121614.DOC

Tony –

I'm out Jan. 14-20 and need to again get management approval for the revised proposed CD (attached in redline). I'll take care of that as soon as I return. Since the deadline is Feb. 17, there should be plenty of time. In the meantime, I'll also get admitted and get an ECF login.

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1 ~~SAM HIRSCH~~JOHN C. CRUDEN
Acting Assistant Attorney General
2 Environment & Natural Resources Division
3 United States Department of Justice
LESLIE M. HILL (D.C. Bar No. 476008)
4 Leslie.Hill@usdoj.gov
Environmental Defense Section
5 601 D Street N.W., Suite 8000
6 Washington D.C. 20004
Telephone (202) 514-0375
7 Facsimile (202) 514-8865

8 Attorneys for Defendant

9 Richard H. Mays (AR Bar No. 61043)
10 RICHARD MAYS LAW FIRM, PLLC
11 115 South Third Street
Heber Springs, AR 72543

12 Attorney for Plaintiff

13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE EASTERN DISTRICT OF ARKANSAS**

16
17 SIERRA CLUB,

18 Plaintiff,

19 v.

20
21 GINA McCARTHY, in her official capacity
as the Administrator of the United States
22 Environmental Protection Agency,

23 Defendant.

Case No. 4:14-cv-00643-JLH

[PROPOSED] CONSENT DECREE

24
25 WHEREAS, on August 6, 2014, Plaintiff Sierra Club ("Plaintiff") filed the above-
26 captioned matter in the U.S. District Court for the Northern District of California against
27 Gina McCarthy, in her official capacity as Administrator of the United States
28 Environmental Protection Agency (hereinafter "EPA" or "Defendant");

1 WHEREAS, by Order dated October 30, 2014, the U.S. District Court for the
2 Northern District of California transferred this case to this District;

3 WHEREAS, Plaintiff alleges that EPA has failed to undertake certain non-
4 discretionary duties under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, and
5 that such alleged failure is actionable under section 304(a)(2) of the CAA, § 7604(a)(2);

6 WHEREAS, Plaintiff alleges that EPA has failed to perform a duty mandated by
7 CAA section 110(c)(1)(B), 42 U.S.C. § 7410(c)(1)(B), to promulgate a Federal
8 implementation plan within 2 years after disapproving a state implementation plan
9 ("SIP") submission in whole or in part;

10 WHEREAS, Plaintiff alleges that on March 12, 2012, EPA disapproved, in part, a
11 revision to the Arkansas SIP intended to address the regional haze ("RH") requirements
12 of section 169A(b)(2)(B), 42 U.S.C. § 7491(b)(2)(B), and the implementing regulations
13 set forth at 40 C.F.R. § 51.308(d)(1)(A), *Final Rule*, 77 Fed. Reg. 14,604 (Mar. 12,
14 2014);

15 WHEREAS, Plaintiff alleges that on March 12, 2012, EPA also partially
16 disapproved the portion of the Arkansas SIP submittal that addresses the visibility
17 requirement of section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), for the 1997
18 8-hour ozone, *Final Rule*, 62 Fed. Reg. 38,856 (Jul. 18, 1997), and 1997 fine particulate
19 matter ("PM_{2.5}"), *Final Rule*, 62 Fed. Reg. 38,652 (Jul. 18, 1997), national ambient air
20 quality standards ("NAAQS") that the Arkansas SIP contain adequate provisions to
21 prohibit emissions from interfering with measures required in another state to protect
22 visibility, 77 Fed. Reg. at 14,604;

23 WHEREAS, on March 12, 2012, EPA stated that it "must, within 24 months
24 following a final disapproval, either approve a SIP or promulgate a Federal
25 Implementation Plan ["FIP"]. We will of course consider, and would prefer, approving a
26 SIP if the state submits a revised plan that we can approve before the expiration of the
27 mandatory FIP clock for the portions of the SIP we are disapproving in this rulemaking
28 action," 77 Fed. Reg. at 14,606;

1 WHEREAS, Plaintiff alleges that the referenced EPA partial disapproval
2 decisions took effect on April 11, 2012;

3 WHEREAS, EPA did not, by April 11, 2014, promulgate a regional haze FIP or
4 approve a revised regional haze SIP for Arkansas;

5 WHEREAS, EPA did not, by April 11, 2014, promulgate a FIP or approve a
6 revised SIP for Arkansas addressing the requirements of section 110(a)(2)(D)(i)(II), 42
7 U.S.C. § 7410(a)(2)(D)(i)(II), for the 1997 8-hour ozone NAAQS and the 1997 PM_{2.5}
8 NAAQS;

9 WHEREAS, the relief requested in the Complaint includes, among other things,
10 an order from this Court to establish a date certain by which EPA must fulfill its
11 obligations;

12 WHEREAS, Plaintiff and EPA have agreed to a settlement of this action without
13 admission of any issue of fact or law, except as expressly provided herein;

14 WHEREAS, Plaintiff and EPA, by entering into this Consent Decree, do not
15 waive or limit any claim, remedy, or defense, on any grounds, related to any final EPA
16 action;

17 WHEREAS, Plaintiff and EPA consider this Consent Decree to be an adequate
18 and equitable resolution of all the claims in this matter and therefore wish to effectuate a
19 settlement;

20 WHEREAS, it is in the interest of the public, Plaintiff Sierra Club, Defendant
21 EPA, and judicial economy to resolve this matter without protracted litigation;

22 WHEREAS, Plaintiff and EPA agree that this Court has jurisdiction over this
23 matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. §
24 7604(a)(2); and

25 WHEREAS, the Court, by entering this Consent Decree, finds that the Consent
26 Decree is fair, reasonable, in the public interest, and consistent with the Clean Air Act;

1 NOW THEREFORE, before the taking of testimony, without trial or
2 determination of any issues of fact or law, and upon the consent of Plaintiff Sierra Club
3 and Defendant EPA, it is hereby ordered, adjudged and decreed that:

4 1. The appropriate EPA official shall:

5 a. either sign a notice of proposed rulemaking in which it proposes
6 approval of a revised SIP submission from Arkansas, promulgation of a FIP, or partial
7 approval of a revised SIP submission and promulgation of a partial FIP for Arkansas that
8 collectively addresses the deficiencies in Arkansas' regional haze SIP identified by EPA
9 in its March 12, 2012 action, 77 Fed. Reg. 14,604, no later than ~~February 17~~ March 6,
10 2015; and sign a notice of final rulemaking to address these requirements no later than
11 December 15, 2015; and

12 b. either sign a notice of proposed rulemaking in which it proposes
13 approval of a revised SIP submission, promulgation of a FIP, or partial approval of a
14 revised SIP submission and promulgation of a partial FIP for Arkansas that collectively
15 addresses the deficiencies in Arkansas' SIP related to the requirements of CAA section
16 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), for the 1997 8-hour ozone NAAQS
17 and the 1997 PM_{2.5} NAAQS, identified by EPA in its March 12, 2012 action, 77 Fed.
18 Reg. 14,604, no later than ~~February 17~~ March 6, 2015; and sign a notice of final
19 rulemaking to address these requirements no later than December 15, 2015.

20 2. EPA shall, within 15 business days of signature, deliver notice of each action
21 taken pursuant to paragraph 1 of this Consent Decree to the Office of the Federal Register
22 for review and publication.

23 3. After EPA has completed the actions set forth in Paragraph 1 of this Consent
24 Decree and after notice of each proposed and final action required by paragraph 1 has
25 been published in the Federal Register, EPA may move to have this Decree terminated
26 and the action dismissed. Plaintiff shall have fourteen (14) days in which to respond to
27 such motion, unless the parties stipulate to a longer time for Plaintiff to respond.
28

1 4. The deadlines established by this Consent Decree may be extended (a) by
2 written stipulation of Plaintiff and EPA with notice to the Court, or (b) by the Court upon
3 motion of EPA for good cause shown pursuant to the Federal Rules of Civil Procedure
4 and upon consideration of any response by Plaintiff and any reply by EPA. Any other
5 provision of this Consent Decree also may be modified by the Court following motion of
6 an undersigned party for good cause shown pursuant to the Federal Rules of Civil
7 Procedure and upon consideration of any response by a non-moving party and any reply.

8 5. If a lapse in appropriations for EPA occurs within one hundred and twenty
9 (120) days prior to any deadline in Paragraph 1 in this Decree, that deadline shall be
10 extended automatically one day for each day of the lapse in appropriations.

11 6. Plaintiff and EPA agree that this Consent Decree shall constitute a complete
12 and final settlement of all claims that Plaintiff has asserted in this case. The Sierra Club
13 therefore discharges and covenants not to sue the United States, including EPA, for any
14 such claims.

15 7. In the event of a dispute between Plaintiff and EPA concerning the
16 interpretation or implementation of any aspect of this Consent Decree, the disputing party
17 shall provide the other party with a written notice outlining the nature of the dispute and
18 requesting informal negotiations. These parties shall meet and confer in order to attempt
19 to resolve the dispute. If these parties are unable to resolve the dispute within ten (10)
20 business days after receipt of the notice, either party may petition the Court to resolve the
21 dispute.

22 8. No motion or other proceeding seeking to enforce this Consent Decree or for
23 contempt of Court shall be properly filed unless the procedure set forth in Paragraph 7
24 has been followed, and the moving party has provided the other party with written notice
25 received at least ten (10) business days before the filing of such motion or proceeding.

26 9. EPA agrees that Plaintiff is entitled to recover "costs of litigation" (including
27 reasonable attorney fees) incurred in this matter pursuant to 42 U.S.C. § 7604(d). The
28 deadline for filing a motion for costs of litigation (including attorney fees) for activities

1 performed prior to entry of the Consent Decree is hereby extended until ninety (90) days
2 after this Consent Decree is entered by the Court. During this period, the Parties shall
3 seek to resolve informally any claim for costs of litigation (including attorney fees), and
4 if they cannot, Plaintiff will file a motion for costs of litigation (including attorney fees)
5 or a stipulation or motion to extend the deadline to file such a motion. Plaintiff reserves
6 its right to seek litigation costs for any work performed after the lodging of this Consent
7 Decree. EPA does not concede that Plaintiff will be entitled to recover costs incurred
8 after the lodging of this Consent Decree, and the parties reserve all claims and defenses
9 with respect to any future claim for costs of litigation.

10 10. This Court shall retain jurisdiction over this matter to enforce the terms of
11 this Consent Decree and to consider any requests for costs of litigation, including
12 attorney fees.

13 11. Nothing in the terms of this Consent Decree shall be construed (a) to confer
14 upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction
15 of the United States Courts of Appeals under CAA section 307(b)(1),
16 42 U.S.C. § 7607(b)(1) or (b) to waive any claims, remedies, or defenses that the parties
17 may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

18 12. Nothing in this Consent Decree shall be construed to limit or modify any
19 discretion accorded EPA by the Clean Air Act or by general principles of administrative
20 law in taking the actions which are the subject of this Consent Decree, including the
21 discretion to alter, amend, or revise any final actions promulgated pursuant to this
22 Consent Decree. EPA's obligation to perform each action specified in this Consent
23 Decree does not constitute a limitation or modification of EPA's discretion within the
24 meaning of this paragraph.

25 13. Except as expressly provided herein, nothing in this Consent Decree shall be
26 construed as an admission of any issue of fact or law nor to waive or limit any claim,
27 remedy, or defense, on any grounds, related to any final action EPA takes with respect to
28 the actions addressed in this Consent Decree.

1 14. It is hereby expressly understood and agreed that this Consent Decree was
2 jointly drafted by Plaintiff and EPA. Accordingly, the parties hereby agree that any and
3 all rules of construction to the effect that ambiguity is construed against the drafting party
4 shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of
5 this Consent Decree.

6 15. The parties agree and acknowledge that before this Consent Decree can be
7 finalized and entered by the Court, EPA must provide notice of this Consent Decree in
8 the Federal Register and an opportunity for public comment pursuant to CAA section
9 113(g), 42 U.S.C. § 7413(g). After this Consent Decree has undergone notice and
10 comment, the Administrator and/or the Attorney General, as appropriate, shall promptly
11 consider any written comments in determining whether to withdraw or withhold their
12 consent to the Consent Decree, in accordance with CAA section 113(g). If the
13 Administrator and/or the Attorney General do not elect to withdraw or withhold consent,
14 EPA shall promptly file a motion that requests that the Court enter this Consent Decree.

15 16. Any notices required or provided for by this Consent Decree shall be in
16 writing, via electronic mail or other means, and sent to the following (or to any new
17 address of counsel as filed and listed in the docket of the above-captioned matter, at a
18 future date):

19 For Plaintiff Sierra Club:

20 Richard H. Mays, Esq.
21 RICHARD MAYS LAW FIRM, PLLC
22 115 South Third Street
23 Heber Springs, AR 72543

24 Casey A. Roberts
25 Tony G. Mendoza
26 Sierra Club
27 85 Second Street, 211d Floor
28 San Francisco, CA 94105
 (415) 977-5710 (Roberts)
 (415) 977-5589 (Mendoza)
 (415) 977-5793 (facsimile)
 casey.roberts@sierraclub.org
 tony.mendoza@sierraclub.org

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17. EPA and Plaintiff recognize and acknowledge that the obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

19. The undersigned representatives of Plaintiff Sierra Club and Defendant EPA certify that they are fully authorized by the party they represent to consent to the Court's entry of the terms and conditions of this Decree.

SO ORDERED on this day of , 2015.

[PROPOSED] CONSENT DECREE
CASE NO. 4:14-cv-00643-JLH

1
2 COUNSEL FOR PLAINTIFF:
3

4 RICHARD H. MAYS (AR Bar No. 61043)
5 RICHARD MAYS LAW FIRM, PLLC
6 115 South Third Street
7 Heber Springs, AR 72543

8 CASEY A. ROBERTS (CA Bar No. 253474)
9 SIERRA CLUB
10 85 Second Street, 211d Floor
11 San Francisco, CA 94105
12 (415) 977-5710
13 (415) 977-5793 (facsimile)
14 casey.roberts@sierraclub.org

15 TONY G. MENDOZA
16 SIERRA CLUB
17 85 Second Street, 2nd Floor
18 San Francisco, CA 94105
19 (415) 977-5589
20 (415) 977-5793 (facsimile)
21 tony.mendoza@sierraclub.org

22 *Attorneys for Plaintiff Sierra Club*
23
24
25
26
27
28

1
2 COUNSEL FOR DEFENDANT:

SAM HIRSCHJOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division

3
4
5
6 LESLIE M. HILL (D.C. Bar No. 476008)
Environmental Defense Section
7 601 D Street N.W., Suite 8000
Washington D.C. 20004
8 Tel. (202) 514-0375
9 Email: Leslie.Hill@usdoj.gov

10 *Attorneys for Defendant EPA*

11 Of counsel:
12 Barbara A. Nann
Assistant Regional Counsel
13 Region 6
14 U.S. Environmental Protection Agency
15
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Nann, Barbara

From: rhmays@richardmayslawfirm.com
Sent: Tuesday, January 13, 2015 5:09 PM
To: Hill, Leslie (ENRD); Tony Mendoza
Cc: Casey Roberts; Nann, Barbara
Subject: RE: Arkansas consent decree - change in deadline for proposed rule

Leslie: Do you anticipate asking the Court for a hearing on the Consent Decree, or simply submitting it as a joint petition? Of course, the Court can set a hearing if he thinks he needs one.

Richard H. Mays
Attorney at Law

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PLEASE REPORT ANY TRANSMISSION DIFFICULTIES AS SOON AS POSSIBLE.

----- Original Message -----

Subject: RE: Arkansas consent decree - change in deadline for proposed rule
From: "Hill, Leslie (ENRD)" <Leslie.Hill@usdoj.gov>
Date: Tue, January 13, 2015 5:02 pm
To: Tony Mendoza <tony.mendoza@sierraclub.org>
Cc: "rhmays@richardmayslawfirm.com" <rhmays@richardmayslawfirm.com>, "Casey Roberts" <Casey.Roberts@sierraclub.org>, "Nann, Barbara" <nann.barbara@epa.gov>

Tony -

I'm out Jan. 14-20 and need to again get management approval for the revised proposed CD (attached in redline). I'll take care of that as soon as I return. Since the deadline is Feb. 17, there should be plenty of time. In the meantime, I'll also get admitted and get an ECF login.

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Sent: Tuesday, January 13, 2015 5:00 PM

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Nann, Barbara

From: Tony Mendoza <tony.mendoza@sierraclub.org>
Sent: Tuesday, January 13, 2015 5:10 PM
To: Hill, Leslie (ENRD)
Cc: rhmays@richardmayslawfirm.com; Casey Roberts; Nann, Barbara
Subject: Re: Arkansas consent decree - change in deadline for proposed rule

Leslie - The edits to the CD are of course fine with us. And that schedule make sense as well. Thanks. Tony

On Tue, Jan 13, 2015 at 3:02 PM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

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Sent: Tuesday, January 13, 2015 5:14 PM
To: rhmays@richardmayslawfirm.com; Tony Mendoza
Cc: Casey Roberts; Nann, Barbara
Subject: RE: Arkansas consent decree - change in deadline for proposed rule

Richard --

Once we lodge the revised proposed CD, assuming no significant negative comments during the 113(g) review, we'd expect to jointly move for entry of the CD. I would not request a hearing date, but would leave that to the Court. My experience with this type of CD is that courts generally don't have a hearing and often enter the CD in short order so the case can be closed in the ECF.

Leslie

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To: Hill, Leslie (ENRD); Tony Mendoza
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Attorney at Law

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Date: Tue, January 13, 2015 5:02 pm
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Cc: "rhmays@richardmayslawfirm.com" <rhmays@richardmayslawfirm.com>, "Casey Roberts" <Casey.Roberts@sierraclub.org>, "Nann, Barbara" <nann.barbara@epa.gov>

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Sent: Tuesday, January 13, 2015 5:00 PM
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Cc: rhmayes@richardmayeslawfirm.com; Casey Roberts; Nann, Barbara
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tony.mendoza@sierraclub.org

Nann, Barbara

From: Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov>
Sent: Monday, March 09, 2015 9:48 AM
To: 'Tony Mendoza'; Casey Roberts
Cc: Anderson, Lea; Nann, Barbara
Subject: Arkansas Haze Proposed Action

Tony/Casey –

I just wanted to let you know that the proposed action was signed last Friday, March 6. As soon as I get a copy or link, I will forward that as well.

Leslie

Leslie M. Hill
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-0375
(202) 514-8865 (Fax)
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Washington, D.C. 20004

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Nann, Barbara

From: Casey Roberts <casey.roberts@sierraclub.org>
Sent: Monday, March 09, 2015 9:55 AM
To: Hill, Leslie (ENRD)
Cc: Tony Mendoza; Anderson, Lea; Nann, Barbara
Subject: Re: Arkansas Haze Proposed Action

Thank you Leslie,
We look forward to seeing the proposed action as soon as possible, especially as one of our colleagues has a meeting on haze issues with another EPA region this morning and wants to be fully informed of what EPA is proposing for Arkansas as she goes into that meeting.

Casey

Casey Roberts
Staff Attorney
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casey.roberts@sierraclub.org

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On Mon, Mar 9, 2015 at 7:48 AM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

Tony/Casey –

I just wanted to let you know that the proposed action was signed last Friday, March 6. As soon as I get a copy or link, I will forward that as well.

Leslie

Leslie M. Hill

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Defense Section

P.O. Box 7611

Washington, D.C. 20044

(202) 514-0375

(202) 514-8865 (Fax)

leslie.hill@usdoj.gov

Street Address (FEDEX/UPS/courier only, not regular mail):

601 D Street, N.W.

Suite 8000

Washington, D.C. 20004

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Nann, Barbara

From: Tony Mendoza <tony.mendoza@sierraclub.org>
Sent: Thursday, April 16, 2015 2:46 PM
To: Nann, Barbara
Subject: my contact info

Barbara - Here's my contact info for future reference. Thanks. Tony

--

Tony G Mendoza
Staff Attorney
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
(415) 977-5589
(415) 977-5793 fax
tony.mendoza@sierraclub.org

Nann, Barbara

From: Nann, Barbara
Sent: Thursday, April 16, 2015 2:47 PM
To: 'Tony Mendoza'
Subject: RE: my contact info
Attachments: Apr 13 2015 Letter to G Donaldson.pdf

From: Tony Mendoza [mailto:tony.mendoza@sierraclub.org]
Sent: Thursday, April 16, 2015 2:46 PM
To: Nann, Barbara
Subject: my contact info

Barbara - Here's my contact info for future reference. Thanks. Tony

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HOUSTON	WASHINGTON

April 13, 2015

Bill Bumpers
TEL: (202) 639-7718
FAX: (202) 585-1008
william.bumpers@bakerbotts.com

VIA E-MAIL (DONALDSON.GUY@EPA.GOV)

Mr. Guy R. Donaldson
Chief, Air Planning Section (6PD-L)
United States Environmental Protection Agency - Region 6
1445 Ross Avenue
Suite 700
6PD-L
Dallas, TX 75202-2733

Re: Request for an Extension of the Public Comment Period on the Proposed Rule to
Promulgate a Regional Haze and Interstate Visibility Transport Federal
Implementation Plan for Arkansas, Docket No. EPA-R06-OAR-2015-0189

Dear Mr. Donaldson:

Entergy Arkansas Inc. ("EAI") requests that the U.S. Environmental Protection Agency ("EPA") provide stakeholders an additional 60 days to submit comments on the proposed Federal Implementation Plan ("FIP") to address regional haze and interstate visibility transport for Arkansas ("Proposed FIP"), which was published in the *Federal Register* on April 8, 2015, at 80 Fed. Reg. 18,944. Despite the complexity of the Proposed FIP and EPA's proposal to establish emissions control requirements on 11 emissions units, EPA has established a comment deadline of May 16, 2015. EAI does not believe that a 38-day comment period is sufficient to analyze the proposed requirements in the Proposed FIP, plus the modeling, emissions control costs and other information in the over 370 supporting and related documents that EPA made publicly available in the docket for this rulemaking upon publication of the Proposed FIP, on April 8, 2015.¹

EPA has generally offered significantly more time for comment on proposed Regional Haze FIPs in recognition of the complex legal and technical issues involved. For example, most recently, EPA initially provided a 63-day comment period on its Proposed Regional Haze FIPs for Oklahoma and Texas, 79 Fed. Reg. 74,818 (Dec. 16, 2014), but then extended the comment period an additional 62 days, to April 20, 2015. *See* 80 Fed. Reg. 3,536 (Jan. 23, 2015). That proposal only addressed emissions control requirements at four more emissions units than the

¹ Although only 138 supporting documents are listed in the docket, several of them have additional files associated with them that also will need to be reviewed and analyzed.

Proposed FIP for Arkansas, yet EPA offered a comment period that is more than three times longer than the comment period EPA has established for the Proposed Arkansas FIP.

Further, documentation needed to comprehensively analyze EPA's modeling in the Proposed FIP does not appear to have been included in the docket. Based on a preliminary review, the following documentation is not available in the docket:

- Lambert Conformal Conic ("LCC") conversion workbook or software program where EPA converted the Latitude/Longitude of the Independence Station source locations to LCC. If a program other than an Excel file was used, EPA needs to provide the specific data inputs entered for the coordinate conversion.
- Documentation that would explain differences in model selections between the Arkansas Reasonable Progress Modeling for Independence Station and the Arkansas best available retrofit technology ("BART") Modeling Protocol (i.e., liquid precipitation scavenging coefficient for SO₂ and monthly ozone values used to fill in missing data)
- Documentation on the use of POSTUTIL.

EPA also has noted in several files within the docket that additional files are available upon request. A 38-day review period does not allow adequate time to request the files, obtain them from EPA, review them, and develop any appropriate comments.

Finally, EAI has determined that EPA's modeled location of Independence Station is incorrect. The Independence Station location, as summarized in Table 2-3 of the Appendix C Technical Support Document ("TSD"), represents an approximate location of the Independence Station coal units.² As documented in the Appendix C TSD, EPA used the Trinity generated CALMET data set in the Independence Station CALPUFF simulations. As such, the map projection for the CALPUFF computational modeling domain must be LCC matching the CALMET approved domain. EPA's modeling for Independence Station was conducted in LCC; however, the LCC coordinates for the Independence Station coal units are approximately 110 km off in an LCC projection. Therefore, the basis of EPA's reasonable progress modeling for Independence Station is incorrect. Since the LCC conversion workbook or software program where EPA converted the latitude/longitude of the Independence Station source locations to LCC was not included in the TSD, EAI cannot determine how EPA converted the latitude/longitude values to LCC.

To provide interested stakeholders with sufficient information to fully review and analyze the Proposed FIP, EPA should include the missing information in the docket and correct the modeled location of the Independence Station.

² Appendix C, Technical Support Document for Visibility Modeling Analysis for Entergy Independence Generating Station, prepared by Michael Feldman (March 2015).

EAI believes a 60-day extension of the comment period on the Proposed FIP is appropriate to allow stakeholders sufficient time for adequate review and analysis of the Proposed FIP and the supporting documentation, and for preparation of comprehensive comments on the range of legal, policy, and factual issues that the Proposed FIP raises. Accordingly, EAI requests that the U.S. Environmental Protection Agency extend the comment period until July 15, 2015.

Sincerely,

A handwritten signature in dark ink, appearing to be "B. Botts", written over a horizontal line.

[Baker Botts L.L.P.]
Counsel to EAI

BB

Nann, Barbara

From: Nann, Barbara
Sent: Friday, April 17, 2015 4:31 PM
To: Medina, Dayana
Subject: RE: Arkansas regional haze proposed FIP comment period

I talked to him yesterday and sent him the request for extension. Tony Mendoza asked how an extension would impact the December CD deadline and I said I didn't know. For now, EPA is still planning on meeting the Dec 15 deadline.

From: Medina, Dayana
Sent: Friday, April 17, 2015 4:18 PM
To: Nann, Barbara
Subject: RE: Arkansas regional haze proposed FIP comment period

Hi Barbara,

I just got back to the office from Little Rock and read Tony's email, but have not replied yet. Are you available on Monday for us to give him a call?

Thanks,

Dayana Medina
U.S. Environmental Protection Agency, Region 6
Multimedia Planning and Permitting Division
Air Planning Section (6PD-L)
214-665-7241

From: Tony Mendoza [<mailto:tony.mendoza@sierraclub.org>]
Sent: Wednesday, April 15, 2015 12:10 PM
To: Medina, Dayana
Subject: Arkansas regional haze proposed FIP comment period

Dayana - I left you a voice message about this yesterday, but it's my understanding that another interested party has requested an extension of the comment period deadline for the Arkansas regional haze rule. I'd like to discuss that with you, and perhaps Guy Donaldson or Barbara Nann if either is available too, at your convenience. Is there a time when we might speak? I'm generally free today and tomorrow. Tony

--

Tony G Mendoza
Staff Attorney
Sierra Club Environmental Law Program
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tony.mendoza@sierraclub.org

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Tony G Mendoza
Staff Attorney
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
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(415) 977-5793 fax
tony.mendoza@sierraclub.org

Nann, Barbara

From: Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov>
Sent: Tuesday, April 28, 2015 3:09 PM
To: Tony Mendoza; Casey Roberts
Cc: rhmays@richardmayslawfirm.com; Anderson, Lea; Nann, Barbara
Subject: FW: 113(g) comments on Arkansas CD
Attachments: Comment by Arkansas AG.pdf; 2014-04-20 Ltr to Whom It May Concern (EPA Docket Center) (Joint Comments on EPA-HQ-)GC-2015-0162).pdf

Tony/Casey –

Attached please find the comments received during the section 113(g) comment period. We'd like to discuss them at your convenience. I'm generally available on Thursday between 10:30 - 12 and 2-5 Eastern or most of the day Friday.

Leslie

From: Anderson, Lea [mailto:anderson.lea@epa.gov]
Sent: Tuesday, April 28, 2015 3:40 PM
To: Hill, Leslie (ENRD)
Subject: 113(g) comments on Arkansas CD

Hi Leslie,

Attached please find the two comments that we received on the lodged consent decree addressing deadlines for action on a regional haze plan for Arkansas.

Lea Anderson
Environmental Protection Agency
Office of General Counsel
WJCN 7310A
202.564.5571



THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

April 20, 2015

Environmental Protection Agency
EPA Docket Center (EPA/DC)
Mailcode 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

Attention: Docket ID No. EPA-HQ-OGC-2015-0162; comments submitted electronically

To Whom It May Concern:

Please accept these comments regarding the proposed Consent Decree in the matter of *Sierra Club v. McCarthy*, No. 4:14-cv-00643-JLH (E.D. Ark.). I request that this decree be withdrawn by either the Department of Justice ("DOJ") or the Environmental Protection Agency ("EPA" or "Agency"). As described in my comments below, the decree is improper and inconsistent with the Clean Air Act, 42 U.S.C. 7401 *et seq.* First and foremost, the Sierra Club lacks standing to bring this suit. Further, standing cannot be waived by the parties through a Consent Decree. Additionally, the decree would undermine the cooperative relationship between the State and the EPA in implementing regional haze regulations.

The origin of this matter begins on September 28, 2007, when the Arkansas Pollution Control and Ecology Commission ("PCE" or "Commission") adopted changes to PCE Regulation No. 19, Regulations of Arkansas Plan of Implementation for Air Pollution Control, to address federal requirements regarding regional haze (or visibility). The amendments to Reg. 19 were submitted by the Arkansas Department of Environmental Quality ("ADEQ") as the State Implementation Plan ("SIP") for regional haze, as required by 40 C.F.R. § 51.308(d). Nearly five (5) years later, the EPA finally issued a decision on Arkansas's SIP which partially approved and partially disapproved the plan. 77 Fed. Reg. 14604 (March 12, 2012).

On August 8, 2014, the Sierra Club filed a complaint in San Francisco, California seeking to compel the EPA to issue a Federal Implementation Plan ("FIP") to address the deficiencies the Agency identified in its March 12, 2012 disapproval. Sierra Club's action was transferred to a federal district court in Little Rock, Arkansas, and, on February 11, 2015, the EPA lodged a proposed consent decree to settle the action. The proposed consent decree was submitted to public comment under Docket ID No. EPA-HQ-OGC-2015-0162.

The Sierra Club purports to bring suit on its own behalf and that of its members, including members in Arkansas and members that use Class I federal areas in Arkansas. As a threshold matter, the Sierra Club must establish that it has standing to invoke the jurisdiction of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1192). The Sierra Club, as an association, is permitted to bring suit on behalf of its members when:

(1) Its individual members have standing in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the relief sought does not require the participation of individual members. *Families for Asbestos Compliance Testing and Safety v. City of St. Louis*, 638 F.Supp.2d 1117, 1121 (E.D. Mo. 2009) (citing *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996)).

Thus, the Sierra Club must meet the "irreducible constitutional minimum" requirement for standing for its individual members. *Id.* In order to meet part (1) of the association's standing, the individual members must meet the following three criteria:

(1) they have suffered an "injury in fact;" (2) the injury is "fairly traceable" to the challenged conduct of the defendant; and (3) the injury will likely be redressed through the relief sought in the complaint. *Id.* (citing *Lujan*).

In its Complaint, the Sierra Club argues that its members' use and enjoyment of Class I federal areas in Arkansas are adversely affected by visibility impairments. I dispute whether the Sierra Club has met the first requirement of the *Lujan* test, but even if it has, it has not met elements (2) and (3). Sierra Club has not, and cannot, establish that this "injury" is "fairly traceable" to the EPA's failure to promulgate a FIP within two years of disapproval of the SIP or that promulgation of a FIP will redress the injury. As such, the individual members of the Sierra Club do not have standing in their own right. The individual member's standing is an essential part of the association's standing, the criteria of which is established in *Families for Asbestos Compliance Testing*.

Nothing in the record before the Court establishes standing on the part of the Sierra Club or its members. In fact, the only information in the record directly contradicts the Sierra Club's assertion. In its Answer, Defendant EPA specifically denies that Plaintiff Sierra Club has standing to bring the suit. See Answer, Paragraph 9. Thus, through the proposed Consent Decree, the EPA is attempting to waive the issue of standing. Such waiver is impermissible. "The question of standing 'is jurisdictional and not subject to waiver.'" *Families for Asbestos Compliance Testing and Safety v. City of St. Louis*, 638 F.Supp.2d 1117, 1121 (E.D. Mo. 2009) (citing *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996)). The court can raise the issue of standing *sua sponte*. *Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004).

It is inappropriate for the EPA to make decisions for the State of Arkansas because of pressure exerted by a California organization that cannot establish that it has the legal right to seek the jurisdiction of the court. Therefore, I urge the EPA to reconsider entering into this Consent Decree when the Sierra Club clearly has not met its burden to establish standing of either itself or its members.

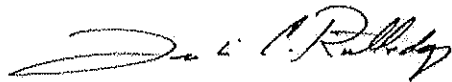
On April 8, 2015, the EPA issued a draft FIP for Arkansas regarding regional haze. The agency may consider any comments on the proposed consent decree to be moot now that the FIP process has begun. However, that is not the case. The proposed consent decree also contains a proposed date of December 15, 2015, for finalization of the FIP. If entered, this date becomes binding on the EPA and, by extension, the State of Arkansas. At the same time, the EPA's draft FIP specifically states, "We believe...it is preferable for states to take the lead in implementing the Regional Haze requirements as envisioned by the Clean Air Act." 80 Fed. Reg. 18944, 18945 (April 8, 2015). By accepting a deadline dictated by the Sierra Club, the EPA will be pressured by special interests and likely cannot devote the necessary resources and consideration to working with the State to develop an approvable SIP.

Not only do I direct my comments toward compliance with federal environmental laws, but also from my duty to protect consumers from unreasonable and unnecessary utility rate increases. The Consumer Utility Rate Advocacy Division ("CURAD") of my office represents Arkansas ratepayers in front of the Arkansas Public Service Commission ("PSC") and the Federal Energy Regulatory Commission ("FERC"). CURAD acts on behalf of Arkansas consumers when utilities petition the PSC for rate increases. It is likely that this FIP will result in significant compliance costs for utilities that will result in a pass-through to consumers as rate increases.

Based on the foregoing reasons, I request that the EPA reconsider the prudence and legality of entering into the proposed consent decree. The tenets of

cooperative federalism which underpin the Clean Air Act would dictate that the EPA must give first priority to the interests of the State, not an outside association without standing to invoke the jurisdiction of the court.

Sincerely,

A handwritten signature in dark ink, appearing to read "Leslie Rutledge", with a stylized, flowing script.

Leslie Rutledge
Attorney General

cc: Sen. Tom Cotton
Sen. John Boozman
Rep. Rick Crawford
Rep. French Hill
Rep. Steve Womack
Rep. Bruce Westerman

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April 20, 2015

DARRELL D. DOVER (1933-2009)
PHILIP E. DIXON (1932-2005)

OF COUNSEL
GARLAND W. BINNS, JR.

+ ALSO LICENSED IN TENNESSEE
+ ALSO LICENSED IN TEXAS

 MERITAS LAW FIRMS WORLDWIDE

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and Submitted Online at www.regulations.gov*

To Whom It May Concern
EPA Docket Center
EPA West, Room 3334
1301 Constitution Avenue, NW
Washington, DC 20460

RE: Proposed Consent Decree, Clean Air Act Citizen Suit, Sierra Club vs.
McCarthy, No. 4:14-cv-00643-JLH (E.D. Ark.) Docket No. EPA-HQ-
OGC-2015-0162


To Whom It May Concern:

This firm represents Nucor Steel -- Arkansas, a division of Nucor Corporation and Nucor-Yamato Steel Company in connection with the above-referenced docket. Enclosed for filing in the docket are Joint Comments of Nucor Steel -- Arkansas, Nucor-Yamato Steel Company, The Arkansas State Chamber of Commerce, The Associated Industries of Arkansas, Arkansas Electric Energy Consumers, and Arkansas Gas Consumers.

Please let me know if you have any questions.

Sincerely,

DOVER DIXON HORNE PLLC



Mark H. Allison

MHA/njp
Enclosure

To Whom It May Concern
EPA Docket Center
April 20, 2015
Page 2

cc (with enclosures): M. Lea Anderson
Air and Radiation Law Office (2344A)
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460
Email: anderson.lea@epa.gov

Wayne Turney
Les Jackson
Jordan Tinsley, Esq.

Comments of Nucor Steel – Arkansas, a division of Nucor Corporation,
Nucor-Yamato Steel Company, the Arkansas State Chamber of Commerce,
the Associated Industries of Arkansas, Arkansas Electric Energy Consumers, Inc.
and Arkansas Gas Consumers, Inc.

Proposed Consent Decree, Clean Air Act Citizen Suit

Docket No. - EPA–HQ–OGC–2015–0162

Sierra Club v. EPA, U.S.D.C., E.D. Ark. No. 4:14-cv-00643 JLH

Submitted April 20, 2015

To whom it may concern:

Nucor Steel – Arkansas, a division of Nucor Corporation, and Nucor-Yamato Steel Company (collectively “Nucor”) and the Arkansas State Chamber of Commerce (“ASCC”), the Associated Industries of Arkansas (“AIA”), Arkansas Electric Energy Consumers, Inc. (“AEEC”), and Arkansas Gas Consumers, Inc. (“AGC”) submit the following comments and objections to the proposed Consent Decree (“Proposed Consent Decree”) to be entered in the case of *Sierra Club v. EPA*, E.D. Ark. No. 4:14-cv-00643-JLH (“lawsuit”). Notice of the Proposed Consent Decree was published in the Federal Register on March 20, 2015, at 80 Fed.Reg. 14999.

This lawsuit involves a claim filed by the San Francisco legal office of the Sierra Club and certain unidentified Sierra Club members to compel the Environmental Protection Agency (“EPA”) to issue a Federal Implementation Plan (“FIP”) for the State of Arkansas to address EPA’s Regional Haze Rule. The action was originally filed in the United States District Court in San Francisco, California, and was later transferred to the United States District Court for the Eastern District of Arkansas. The only parties to the case are the Sierra Club and EPA. The Consent Decree, if entered, would bind EPA to take specific action regarding the Arkansas State Implementation Plan (“SIP”) as it relates to regional haze. Specifically, EPA would be required to issue a FIP to reduce alleged haze in the region, “a purely aesthetic goal unrelated to health.” *See WildEarth Guardians v. E.P.A.*, 759 F.3d 1196, 1199 (10th Cir. 2014). EPA’s actions will displace the State of Arkansas’s right to determine the appropriate regional haze controls for stationary sources located in Arkansas – a duty which federal law clearly assigns to the state – and will instead impose EPA’s judgment as to the appropriate controls. EPA’s proposed controls will result in exorbitant

costs to Nucor, the members of the ASCC, the AIA, AECC, and AGC, and the public at large, while offering little or no benefit.¹

The FIP calls for the installation of scrubbers on three coal-fired power plants in Arkansas, namely, Flint Creek (operated by AEP-SWEPCO), White Bluff (operated by Entergy Arkansas, Inc.) and Independence (operated by Entergy Arkansas, Inc.). Arkansas Electric Cooperative Corporation (AECC) owns 50% of Flint Creek, 35% of White Bluff, and 35% of Independence. AECC will have to pay a proportional share of the extremely expensive cost of the scrubbers to be installed at these three power plants. Both Nucor facilities take their electric power for their electric arc furnaces (and the rest of the plant operations) from their local electric cooperative, Mississippi County Electric Cooperative, which in turn gets its power from AECC. Electric power is the second highest cost input for Nucor's product. Together the two Nucor facilities account for 20-30% of the total load on the entire AECC system. Consequently, whatever costs that AECC incurs will be passed on proportionally to its local co-operative members, which will pass those costs on to their members (the Nucor facilities) through electric rate increases. For Nucor, this will directly result in an increase in costs of tens, if not hundreds, of millions of dollars. Members of the ASCC, the AIA, AECC and AGC who also obtain electric power from Entergy, AEP-SWEPCO, or a member cooperative of AECC likewise will see increased electric power costs.

The Proposed Consent Decree is of obvious importance to Nucor, the ASCC, the AIA, AECC and AGC, and the citizens of Arkansas. For the following reasons, Nucor, the ASCC, the AIA, AECC and AGC object to the Proposed Consent Decree and request that EPA rescind the Proposed Consent Decree and begin the negotiation process anew, allowing Nucor, the ASCC, the AIA, AECC and AGC and other interested and affected parties a seat at the bargaining table.

**The Negotiation Process Resulting in the Proposed Consent Decree was
Procedurally Unfair, Rendering the Proposed Consent Decree Invalid**

Any consent decree must be "fair, adequate and reasonable," which denotes that it is both procedurally and substantively fair. *U.S. v. Chevron U.S.A., Inc.*, 380 F.Supp. 2d 1104, 1111 (N.D.Cal. 2005). To be procedurally fair, the negotiation process between EPA and Sierra Club must be "fair and **full of adversarial vigor.**" *United States v. Telluride Co.*, 849 F.Supp. 1400, 1402 (D.Colo. 1994) (emphasis added). **The negotiations must be made in good faith.** *Envil. Def. v. Leavitt*, 329 F.Supp. 2d 55, 70 (D.D.C. 2004) (emphasis added). The process must also be "open and at arms-length." *U.S. v. BP Exploration & Oil Co.*, 167 F.Supp.2d 1045, 1051-52 (N.D.Ind. 2001).

Nucor, the ASCC, the AIA, AECC and AGC are gravely concerned that the Sierra Club and EPA have failed to conduct good faith, adversarial negotiations before issuing the Proposed Consent Decree. The consent decree is particularly unfair, and is deserving of great scrutiny, given that Sierra Club and EPA share the same interests and they appear to be employing textbook "sue-and-settle" tactics. "Sue-and-settle" tactics have been intensely criticized in recent years, because the strategy "erodes both states' statutory enforcement authority and their ability to participate in

¹ The Proposed Consent Decree alternatively allows the EPA to approve a revised SIP proposed by the State of Arkansas or grant partial approval of a revised SIP submission and promulgation of a partial FIP. However, the FIP envisioned by the Proposed Consent Decree already has been publicly noticed by EPA.

notice-and-comment rulemaking.” Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol’y 579, 628 (2014); see also David B. Rivkin, Jr. & Adam Doverspike, *Do Sue and Settle Practices Undermine Congressional Intent for Cooperative Federalism on Environmental Matters?*, 15 Engage: J. Federalist Soc’y Prac. Groups 22, 24 (2014) (“Activists and federal agencies are implementing federal programs over the objections of states by relying on sue and settle tactics that make state participation in the substantive rulemaking difficult or impossible.”); U.S. Chamber of Commerce, *EPA’s New Regulatory Front: Regional Haze and the Takeover of State Programs* (2012) (“no state is immune from having its rightful Regional Haze authority trampled by EPA at profound costs for virtually nonexistent benefits”);² Larry Bell, *EPA’s Secret And Costly ‘Sue And Settle’ Collusion With Environmental Organizations* (Feb. 17, 2013).³

The development of EPA’s “sue-and-settle” tactic is well documented, particularly in regional haze cases such as this one. For example, in 2009, a group of environmental advocacy organizations, chiefly Sierra Club, filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state submissions for regional haze. Rather than defend these cases, EPA simply chose to settle. In five Consent Decrees negotiated with environmental groups—and, importantly, without notice to the states that would be affected—EPA agreed to commit itself to various deadlines to act on all states’ visibility improvement plans.⁴ See Chamber of Commerce at 6.

After entering the consent decrees, “the EPA found very creative ways to reject the state implementation plans and then concluded that it was legally required by court order (the consent decrees) to establish its own federally implemented emissions standards.” See Butler & Harris at 604. For example, “the EPA rejected New Mexico’s plan because New Mexico submitted its plan to the EPA only one month before the EPA had to either approve the state plan or impose its own standards under the consent decree.” *Id.* Thus, the consent decree imposed a deadline on the EPA, “which it in turn used to reject a state plan for procedural reasons even though the state was not a party to the consent decree and was not bound to act under it.” *Id.*

EPA’s motive for employing such a tactic is clear. In its normal course of action, if EPA disagrees with a state’s cost-effectiveness calculations, it can forestall the approval of a state’s Regional Haze implementation plan, but it cannot on its own impose its preferred emissions controls. But under sue-and-settle, “by combining this tactic of delaying approval of the state plans with Sue and Settle and a court-imposed deadline to act, EPA has manufactured a loophole to provide itself with the ability to reach into the state haze decisionmaking process and supplant the state as decision maker.” See Chamber of Commerce at 6-7.

² Available at:

https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf

³ Available at:

<http://www.forbes.com/sites/larrybell/2013/02/17/epas-secret-and-costly-sue-and-settle-collusion-with-environmental-organizations/>

⁴ The five Consent Decrees: *National Parks Conservation Assn’ et al. v. Jackson*, Civil Action No. 1: 11-cv-01548 (D.D.C. Dec. 2, 2011); *Sierra Club v. Jackson*, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011); *WildEarth Guardians v. Jackson*, No. 1:11-cv-00743-CMA-MEH (D. Col. June 16, 2011); *WildEarth Guardians v. Jackson*, No. 4:09-CV-02453 (N.D. Cal. Feb. 23, 2010); *WildEarth Guardians v. Jackson*, No. 1:10-cv-01218-REB-BNB (D. Col. Oct. 28, 2010).

The other clear advantage of “sue-and-settle” tactics is that they “prevent states from participating in the rulemaking process established by the APA.” *See* Butler & Harris at 614 (citing 5 U.S.C. § 553). Normally, “States benefit from normal notice-and-comment rulemaking because they may submit comments, and the EPA must address the States’ concerns by either implementing the proposed changes or explaining why it is not using them.” In normal rulemaking, if the EPA proceeds without adequately addressing the comments, a state may sue the EPA under 5 U.S.C. § 706 because the EPA acted arbitrarily and capriciously. By contrast, in “sue-and-settle” cases, litigants are allowed to comment on any proposed settlement, but EPA rarely alters the consent decree in response to adverse comments, and it has no obligation to respond to any such comments. *See* Butler & Harris at 613–617.

“Sue-and-settle” allows for additional shortcuts from the normal rulemaking process. In “sue-and-settle,” the comment period for a consent decree is only thirty days, after which the court is free to enter the decree and give it the force of law. *Id.* In contrast, agency rulemaking is a very onerous process, as explained by one commentator:

The comment period is sixty days, but this is step six of nine complicated steps. After the comment period, the agency assesses all the comments, makes necessary changes, and may even resubmit a new proposal for public comment. Afterward, the Office of Management and Budget must approve the rule before it is published. Consequently, the thought and effort an agency puts into comments received for a rulemaking are not even remotely comparable to the thought and effort it puts into comments received for proposed consent decrees.

See Butler & Harris at 613–617. For these reasons, “It is no wonder that agencies prefer a regime where they can simply ignore comments,” such as “sue-and-settle.” *Id.*

Since August of 2011, EPA has used “sue-and-settle” to impose almost \$375 million in annual costs on ratepayers in New Mexico, Oklahoma, and North Dakota—over the staunch objection of their governors—by requiring installation of more costly controls than the BART controls each state chose. *See* Chamber of Commerce at 6. These exorbitant costs led the U.S. Chamber of Commerce to conduct a case study measuring the costs incurred by eight different states. In sum, the study concluded:

- In Arizona, EPA’s Regional Haze regulation threatens to increase the cost of water, forcing the state to spend an additional \$90.2 million per year to implement the federal regulation.
- In Montana, EPA’s proposed Regional Haze controls are nearly 250% more expensive than what that agency’s standing rules presume to be “cost-effective” for compliance.
- In 2011, the EPA disregarded New Mexico’s Regional Haze plan, instead imposing a federal plan that requires nearly \$840 million more in capital costs...potentially raising average annual household utility bills by \$120.
- Although North Dakota is one of only 12 states that achieves all of EPA’s air quality standards for public health, it would not be able to achieve EPA’s Regional Haze

goals for visibility even by shutting down all industry. The EPA plan would also cost the state an additional \$13 million per year,

- Refusing to approve Oklahoma's Regional Haze plan, the EPA's plan would cost the state \$282 million annually.
- In Wyoming, the EPA proposed a federal implementation plan that would cost almost \$96 million per year more than the state's plan.
- Minnesota is subject to back-to-back Regional Haze regulations, whereby EPA is claiming authority to regulate regional haze twice in succession at its Sherburne County generating plant.
- EPA's proposed plan would cost Nebraska nearly \$24 million per year to achieve invisible "benefits."

See also Larry Bell, *EPA's Secret And Costly 'Sue And Settle' Collusion With Environmental Organizations* (Feb. 17, 2013) (summarizing the Chamber of Commerce's findings).

Given the exorbitant costs to the public and the lack of transparency presented by "sue-and-settle," commentators have labeled EPA's tactic "a dysfunctional area of federal regulatory law" that "erodes both states' statutory enforcement authority and their ability to participate in notice-and-comment rulemaking," *see* Butler & Harris at 628. In the regional haze context, this results in "profound costs for virtually nonexistent benefits." *See* Chamber of Commerce at 8.

In light of this perceived injustice, commentators have noted the need for enhanced judicial monitoring of "sue-and-settle" consent decrees. Judges "should pause for a moment to determine whether the decree truly comports with their views about how an adversarial process is supposed to function." *See* Butler & Harris at 624. When making this determination, "Judges can and should rely on an existing standard that has been ignored in the consent decree context--the case or controversy requirement. For a court to act, at least at the federal level, the court must be acting within its Article III powers." *Id.* This includes meeting the justiciability requirement that there be an actual case or controversy, as well as the requirements of Article III standing. When a judge detects an absence of a real case or controversy, or an insufficient demonstration of standing, "this should alert a judge to the possibility that the parties are not adverse and, perhaps, lead the judge to deny a motion to enter the settlement as a decree." *Id.*

In the present case, extensive discovery is still needed to determine whether and to what extent Sierra Club and EPA have amicably collaborated to craft the terms of the proposed consent decree. In any event, the proposed consent decree should be met with harsh scrutiny, as it exhibits many of the textbook signs of "sue-and-settle" cases discussed above. The consent decree is poised to bypass the normal, exacting requirements of federal rulemaking, and was crafted without the involvement of those who will be affected most. Therefore, it can hardly be said that the consent decree was negotiated in fairness.

The Proposed Consent Decree is Substantively Unfair and will Impose Significant Harm on Nucor, the ASCC, the AIA, AEEC and AGC and the Citizens of Arkansas

A consent decree is improper where it is “inequitable, or contrary to the public good.” *U.S. v. BP Exploration & Oil Co.*, 167 F.Supp.2d 1045, 1049 (N.D.Ind. 2001). Moreover, the costs and benefits of the proposed consent decree must be taken into account. *U.S. v. Chevron U.S.A., Inc.*, 380 F.Supp. 2d 1104, 1113 (N.D.Cal. 2005). The proposed Consent Decree will impose onerous costs which will harm the citizens and businesses of Arkansas, while offering little or no benefits to the public-at-large.

The costs resulting from the Proposed Consent Decree and corresponding FIP are substantial and alone demand that the proposed Consent Decree be rejected. The Consent Decree, if entered, would bind EPA to issue the FIP, which would require the installation of billions of dollars of pollution controls on various stationary sources in Arkansas, including on much of the low-cost electric generating capacity in Arkansas. This expenditure of resources is equal to twenty percent (20%) or more of the Arkansas State Government budget expenditures. This would result in either the closure of several Arkansas based power plants, or, more likely, the installation of expensive pollution control equipment, at a cost approaching or exceeding the original costs of those power plants. Under either scenario, electric rates and costs for all residents of Arkansas will increase dramatically, with widespread economic and social impacts, including real and severe financial impacts on low-income Arkansas residents living below the poverty line. Put simply, the end-user will inevitably shoulder the greatly increased costs of the newly required pollution control equipment. As noted in the opening paragraphs of these comments, Nucor will be forced to endure many such costs as a member of the Mississippi County Electric Cooperative; similarly the members of the ASCC, the AIA, AEEC and AGC also will have to pay for such costs through increased rates by their electric power providers.

Meanwhile, though the costs are indisputably significant, the benefits of the proposed Consent Decree and resulting FIP are close to nil. The proposed Consent Decree is designed to improve “visibility” in two national parks located in Arkansas – the Upper Buffalo and Caney Creek Wilderness Areas – so that visibility in those parks is returned to “natural background conditions” by 2064. Crucially, the Regional Haze Rule with which the FIP is intended to comply **is not a health based rule**. See *WildEarth Guardians v. E.P.A.*, 759 F.3d 1196, 1199 (10th Cir. 2014) (observing that the regional haze regulations involve “a purely aesthetic goal unrelated to health.”). The State of Arkansas is in compliance with all of EPA’s health based air quality standards, and air quality in Arkansas and in most of the rest of the nation has been improving dramatically over the last thirty years.⁵ The provisions of the Arkansas SIP at issue in the underlying case do not deal with human health but rather with visibility alone.

⁵ See, e.g., U.S. EPA, “Our Nation’s Air: Status and Trends through 2010”, Feb. 2012, available at: <http://www.epa.gov/airtrends/2011/report/fullreport.pdf>;

State of Arkansas, draft “State Implementation Plan Review for the Five-Year Regional Haze Progress Report”, April 2014, Revised November 2014, available at:

<http://www.adeq.state.ar.us/air/5year%20RH%20Progress%20Report.pdf>;

and ICF International, “Final Report, Criteria Pollutant Modeling Analysis for Arkansas”, submitted to Arkansas Department of Environmental Quality, July 28, 2014, available at:

http://www.adeq.state.ar.us/air/pdfs/adeq_criteria_pollutant_modeling_final_20140728_tagged.pdf

Enactment of the Proposed Consent Decree will result in, at best, a negligible improvement in visibility in the Upper Buffalo and Caney Creek Wilderness Areas. The supposed improvement in visibility in these parks would likely be incremental and difficult to distinguish by the human eye. *See* Chamber of Commerce at 7 (“In other words, utilities may have to spend billions of dollars for visibility improvements that no one will be able to see or even notice.”). Moreover, while the costs of the Proposed Consent Decree will negatively impact nearly every citizen in Arkansas, the supposed improvement in visibility will affect few. The Upper Buffalo Wilderness Area has only one designated hiking trail, which is developed but unmarked.⁶ It is unclear how many people hike the trail in a given year. Likewise, the Caney Creek Wilderness Area offers no restroom or water facilities for visitors and appears to have only three designated trails running through it.⁷ The U.S. Forest Service notes that usage of the area is “light.”⁸ These “benefits,” such as they are, pale in comparison with the immense harm the Proposed Consent Decree and resulting FIP will cause.

It is apparent that the negotiation process, in whatever form it took, served only to benefit the interests of the Sierra Club and not the ordinary citizens of Arkansas – the people most affected by the Proposed Consent Decree. Citizens, including corporate citizens such as Nucor, and the members of the ASCC, the AIA, AECC and AGC have been denied an opportunity to participate in the process to their great detriment. Being given a short period to comment on an already-decided upon Consent Decree is an insufficient substitute for the formal rule-making process required in this instance. The EPA’s action is not one without consequences to the citizens of this State, a victimless crime so-to-speak. The very real costs involved demand greater scrutiny. No reasonable Court could weigh the harms and benefits and conclude that the Proposed Consent Decree is substantively fair. Accordingly, it should be withdrawn.

The proposed Consent Decree is invalid because it does not arise from a case in which the District Court for the Eastern District of Arkansas has subject matter jurisdiction

The resolution of a claim through a consent decree must “spring from and serve to resolve a dispute within the court’s subject matter jurisdiction,” “com[e] within the general scope of the case made by the pleadings,” and “further the objectives of the law upon which the complaint was based.” *See Local No. 93, International Ass’n of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986); *United States v. Davis*, 11 F. Supp. 2d 183, 187-88 (1998). It is clear from the face of the pleadings entered in the underlying case that the Court does not have jurisdiction, rendering the Proposed Consent Decree invalid and unenforceable. The EPA should withdraw the Proposed Consent Decree and move to dismiss the underlying suit, forcing the Sierra Club to prove that it has Article III standing. The EPA’s seemingly willing capitulation, without so much as a challenge, further evidences an apparent attempt to circumvent proper rule-making procedure.

The irreducible constitutional minimum of standing requires the plaintiff to demonstrate: (1) that the plaintiff has suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical; (2) that there is a causal connection between the injury and the conduct complained

⁶ <http://www.fs.usda.gov/recarea/osfnf/recreation/hunting/recarea/?recid=43499&actid=55>

⁷ <http://www.fs.usda.gov/recarea/ouachita/recarea/?recid=10792>

⁸ *Id.*

of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court; and (3) that it is likely, as opposed to merely speculative, that injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). It is apparent from the face of its Complaint that Sierra Club does not meet the requirements for standing.

The full extent of Sierra Club's supposed injury is contained in paragraph nine of its Complaint, in which it contends, "EPA's failure to promulgate the overdue federal haze plan for Arkansas causes injury to Sierra Club and its members by prolonging existing, and allowing future, visibility impairment. The recreational, aesthetic, and environmental interests of Sierra Club's members have been and continue to be adversely affected by EPA's failure to promulgate the required plan." Sierra Club fails to meet any of the requirements for standing. First, it alleges no injury-in-fact. The allegation makes no mention of any person who has actually suffered from "visibility impairment." Sierra Club may not rest its standing on a general interest shared by the public-at-large. *Lujan*, 504 U.S. at 573. Moreover, its allegation suggests the type of broad, non-particularized injury that is insufficient to support standing. *Id.* Additionally, Sierra Club fails to allege sufficient traceability between the EPA's supposed failure to issue a FIP and the so-called injury suffered by Sierra Club. It does not allege that visibility has decreased in absence of EPA's action or that the visibility would be improved by enactment of the Consent Decree, and Nucor, the ASCC, the AIA, AEEC and AGC submit that the science would not support such an allegation. *See* Chamber of Commerce at 7. Finally, it is pure speculation that forcing the EPA to issue a FIP or approve a revised SIP would decrease haze over the Upper Buffalo and Caney Creek Wilderness Areas. Such an allegation takes for granted the contents of any new FIP or revised SIP, the requirements set forth therein, the actions taken according to the plan, and the results therefrom. The desired outcome is simply too attenuated from the relief sought to satisfy Article III.

Sierra Club and EPA seek an end-run around the constitutional requirement for standing by stipulating that "Plaintiff and EPA agree that this Court has jurisdiction over this matter pursuant to the citizen suit provision in CAA section 304(a)(2), 42 U.S.C. §7604(a)(2)," but such a stipulation is insufficient to satisfy the demands of Article III. The question of standing is not subject to waiver: "[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990) (citations omitted). Further, the need for an exacting demonstration of Article III injury is particularly vital in "sue-and-settle" cases, which this appears to be. *See* Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol'y 579, 628 (2014) (in order to combat the harms caused by "sue-and-settle" cases, judges should view a plaintiff's standing with great scrutiny; a sparse showing of Article III injury "should alert a judge to the possibility that the parties are not adverse and, perhaps, lead the judge to deny a motion to enter the settlement as a decree.").

It is clear that, absent more concrete and compelling factual allegations from Sierra Club in its Complaint, the Court will be without authority to approve the Proposed Consent Decree. Accordingly, the Proposed Consent Decree should be withdrawn and Sierra Club's Article III standing should be challenged in the underlying action.

The Proposed Consent Decree Improperly Delegates EPA's Rule-Making Enforcement

The Consent Decree, through its enforcement mechanisms, effectively gives the Sierra Club power over implementation of EPA's proposed FIP. (Docket Entry 30-1, Consent Decree, ¶7). Should Sierra Club disagree with EPA's implementation of the FIP, including Arkansas' compliance with the FIP, Sierra Club may force EPA to negotiate its concerns and ultimately may resort to court intervention. This improperly grants to a private party, i.e., the Sierra Club, the right to control public policy and air quality management decisions within the state of Arkansas; decisions that are primarily vested within the government of the State of Arkansas through the constitution of the State of Arkansas, Arkansas statute, through the United States Constitution, and through the federal Clean Air Act. See, 42 U.S.C. §7410; Ark. Code Ann. §§8-1-202; 8-4-311. Indeed, the Regional Haze provisions of the Clean Air Act are unique in that, because the sole goal is to improve aesthetics, Arkansas has primary authority over setting Regional Haze standards within its borders. Even if EPA maintains some authority to issue a FIP, and to ensure that a FIP is properly implemented, EPA has not cited to any provision of the Clean Air Act that grants it the authority to delegate its authority to a private party.

The Court Cannot Enter the Consent Decree without the Participation of Indispensable Parties, including the Appropriate Agencies and Officers of the State of Arkansas and the Regulated Utility Companies

No agency or legislative, judicial, or executive arm of government of the State of Arkansas, including the Arkansas Department of Environmental Quality (which is the delegated air quality agency in the State pursuant to the Clean Air Act), the Arkansas Pollution Control & Ecology Commission, the Arkansas Public Service Commission, the Arkansas Governor's Office, or the Arkansas Attorney General, including the Consumer Utility Rate Advocacy Division (CURAD) of the Attorney General's office, is a party to the underlying lawsuit from which this Proposed Consent Decree springs. In addition, none of the owners or operators of the affected facilities who will be required to spend hundreds of millions of dollars to comply with the FIP is a party to the underlying lawsuit.

One or more of these agencies or officers, surely is an indispensable party under Fed.R.Civ.Proc. 19, given that this litigation will invalidate the State of Arkansas's Regional Haze Rule SIP and its recent reports in connection with that rule, and that will have a significant and dramatic impact on the economy and welfare of the State of Arkansas and the allocation of economic, financial and governmental resources of the State. See, *California Dump Truck Owners Assoc. v. Nichols*, 924 F.Supp.2d 1126, 1147 (E.D. Cal. 1995) (public agency is an indispensable party to a suit that could lead to modification or invalidation of one of its rules or regulations); *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir. 1995) (because Missouri state environmental agency was indispensable party and was immune from suit under 11th Amendment, case was remanded to District Court for determination as to whether case could proceed in state's absence); *WildEarth Guardians v. Jackson*, No. 11-CV-00001 (D. Colo. Aug. 9, 2011) (granting state of North Dakota intervention as of right in sue-and-settle case between Sierra Club and EPA involving North Dakota's regional haze controls). Indeed, entry of the Consent Decree without involvement of the duly authorized officials of the State of Arkansas (who under *Massachusetts v.*

EPA, 549 U.S. 547, 127 S.Ct. 1438, 1454 (2007), have a heightened standing that is not enjoyed by normal litigants, such as the Sierra Club) would be an inappropriate exercise of the Court's judicial power.

In short, EPA should withdraw its Proposed Consent Decree, because the Court does not have the right to enter an order of this magnitude affecting the rights of virtually all the residents and citizens of the State of Arkansas without participation and representation by the agencies and officers duly elected and appointed under Arkansas and federal law to manage air quality in the State of Arkansas while promoting sustainable economic growth and the general welfare of the State and its citizens and residents. Such an exercise of the Court's judicial power under these circumstances would be improper. Even if the Court determined it had subject matter jurisdiction over Sierra Club's complaint, it would be improper for the Court to enter the Consent Decree (a) without the participation and involvement of the State of Arkansas and the facility owners and operators which are indispensable parties to this case, and (b) because the Consent Decree improperly delegates the authority granted to EPA under the Clean Air Act, and to the State of Arkansas under Arkansas law and the Clean Air Act, to the Sierra Club.

Nucor Steel – Arkansas, a division of Nucor Corporation

And

Nucor-Yamato Steel Company

By Their Attorneys:

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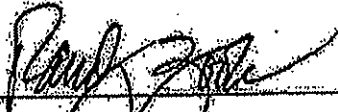
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Nann, Barbara

From: Tony Mendoza <tony.mendoza@sierraclub.org>
Sent: Tuesday, April 28, 2015 3:31 PM
To: Hill, Leslie (ENRD)
Cc: Casey Roberts; rhmays@richardmayslawfirm.com; Anderson, Lea; Nann, Barbara
Subject: Re: FW: 113(g) comments on Arkansas CD

Hi Leslie - Let's do 4 p.m. ET on Thursday. We look forward to speaking with you then. Tony

On Tue, Apr 28, 2015 at 1:08 PM, Hill, Leslie (ENRD) <Leslie.Hill@usdoj.gov> wrote:

Tony/Casey –

Attached please find the comments received during the section 113(g) comment period. We'd like to discuss them at your convenience. I'm generally available on Thursday between 10:30 - 12 and 2-5 Eastern or most of the day Friday.

Leslie

From: Anderson, Lea [mailto:anderson.lea@epa.gov]
Sent: Tuesday, April 28, 2015 3:40 PM
To: Hill, Leslie (ENRD)
Subject: 113(g) comments on Arkansas CD

Hi Leslie,

Attached please find the two comments that we received on the lodged consent decree addressing deadlines for action on a regional haze plan for Arkansas.

Lea Anderson

Environmental Protection Agency

Office of General Counsel

WJCN 7310A

202.564.5571

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Tony G Mendoza
Staff Attorney
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105

(415) 977-5589
(415) 977-5793 fax
tony.mendoza@sierraclub.org

Nann, Barbara

From: Nann, Barbara
Sent: Thursday, May 07, 2015 4:26 PM
To: 'Tony Mendoza'
Subject: AR RH

Tony,

Sorry to respond so slowly to you but the TSD with the supplemental modeling is included in the docket for our FRN for extending the comment period.

Barbara

Barbara A. Nann
Assistant Regional Counsel
OECA & OGC Lead Region Coordinator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202
Phone: (214) 665-2157
Work Cell: (469) 416-9629
Fax: (214) 665-2182

Nann, Barbara

From: Anderson, Lea
Sent: Tuesday, June 23, 2015 11:33 AM
To: Nann, Barbara
Subject: FW: Final Ark SIP

Hi Barbara,

I believe that this is the only responsive document that I have in my LotusNotes files. I will search my outlook files to see if there are any communications with Sierra Club or others that do not include you.

Thanks,
Lea

From: Lea Anderson [mailto:anderson.lea@epamail.epa.gov]
Sent: Tuesday, June 23, 2015 12:03 PM
To: Anderson, Lea
Subject: Fw: Final Ark SIP

M. Lea Anderson
EPA Office of General Counsel
Phone: (202) 564-5571

----- Forwarded by Lea Anderson/DC/USEPA/US on 06/23/2015 12:03 PM -----

From: "William Moore" <wmoore@wmlaw.net>
To: "'McDonough, Eileen \ (ENRD)'" <Eileen.McDonough@usdoj.gov>, Lea Anderson/DC/USEPA/US@EPA,
Cc: Barbara Nann/R6/USEPA/US@EPA
Date: 02/16/2012 04:48 PM
Subject: RE: Final Ark SIP

Not a problem. I am pretty sure we didn't sent it to anyone outside Sierra Club's Arkansas folks. Hope that email didn't come across wrong. Thanks for all your hard work to date on this.

Chip

From: McDonough, Eileen (ENRD) [mailto:Eileen.McDonough@usdoj.gov]
Sent: Thursday, February 16, 2012 4:46 PM
To: William Moore; 'Lea Anderson'
Cc: 'Barbara Nann'
Subject: RE: Final Ark SIP

That was my misunderstanding. Sorry.

Eileen T. McDonough
Environmental Defense Section

THIS IS A CONFIDENTIAL COMMUNICATION INTENDED ONLY FOR THE ABOVE-NAMED RECIPIENT. THE MESSAGE, OR ATTACHMENTS, MAY CONTAIN ATTORNEY-CLIENT INFORMATION, INCLUDING PRIVILEGED AND CONFIDENTIAL MATTER. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE DELETE THE MESSAGE AND NOTIFY THE SENDER IMMEDIATELY.

From: William Moore [<mailto:wmoore@wjmlaw.net>]
Sent: Thursday, February 16, 2012 4:47 PM
To: 'Lea Anderson'
Cc: 'Barbara Nann'; McDonough, Eileen (ENRD)
Subject: RE: Final Ark SIP

Ok. I had concerns about this and specifically asked Eileen and she said it was public. However, I will immediately circle back with the folks I sent it to and stop any further distribution. I think that unless some member of the media called Sierra Club today, we have probable not sent it to anyone outside of a small number of Sierra Club folks working in Arkansas.

Chip

From: Lea Anderson [<mailto:anderson.lea@epamail.epa.gov>]
Sent: Thursday, February 16, 2012 3:26 PM
To: William Moore
Cc: Barbara Nann; 'McDonough, Eileen (ENRD)'
Subject: RE: Final Ark SIP

Hi Chip,

We request that you not broadly disseminate this version of the signed rule, as it could lead to potential confusion to members of the public. I would recommend that you may make it available to those members of Sierra Club who specifically request to see a copy at this time or to those that you know have an specific interest in the EPA's final action. We expect the Office of Federal Register to publish a rule that is identical to the signed copy in all relevant respects but until it appears in the Federal Register it is not "official," if you will.

thanks,
Lea

M. Lea Anderson
EPA Office of General Counsel
Phone: (202) 564-5571

From: "William Moore" <wmoore@wjmlaw.net>
To: "'McDonough, Eileen (ENRD)'" <Eileen.McDonough@usdoj.gov>
Cc: Barbara Nann/R6/USEPA/US@EPA, Lea Anderson/DC/USEPA/US@EPA
Date: 02/15/2012 01:50 PM
Subject: RE: Final Ark SIP

Is this something that can be shared with the public or not???

Chip

From: McDonough, Eileen (ENRD) [<mailto:Eileen.McDonough@usdoj.gov>]
Sent: Wednesday, February 15, 2012 11:37 AM
To: 'William Moore'
Cc: 'Barbara Nann'; anderson.lea@epa.gov
Subject: Final Ark SIP

Here is the signed rule. Have you gotten the fee payment yet? Thanks